

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, D.C.

SEP 20 1999

National Airlift Support Corporation  
Colorado Springs, CO

v.

Fremont County Board of Commissioners  
Canon City, Colorado

Docket No. 16-98-18

**FINAL DECISION AND ORDER**

**INTRODUCTION**

The National Airlift Support Corporation (NASC) has appealed the Director's Determination with regard to its formal complaint, which it filed in accordance with the Rules of Practice for Federally-Assisted Airport Proceedings (FAA Rules of Practice), 14 C.F.R. Part 16. The NASC alleges the Director's Determination contained errors of fact and analysis, which caused FAA to erroneously dismiss NASC's allegations. In its formal complaint, the NASC alleged that it was denied the opportunity to lease and develop land on the Canon City-Fremont County Airport (Airport) which is owned and operated by the Board of Commissioners of Fremont County (County). According to NASC, the denial is contrary to the County's Federal obligations pertaining to exclusive rights and economic nondiscrimination. *[Final Decision and Order, Exhibit 1 Item 1]*

**PROCEDURAL HISTORY**

On October 27, 1998, NASC filed a formal complaint with the FAA alleging that it had been denied the right to lease airport land on which it planned to develop its business of airlift support for military airborne training and civilian skydiving operations, and later, a fixed base operation. *[Director's Determination, Exhibit 1, Item 3]*

On December 11, 1998, the County answered the Complaint and denied that it had violated its grant assurances. It requested dismissal of the complaint because FAA had no reasonable basis for continuing the investigation. To support this premise, the County provided copies of written correspondence between NASC and the County from November, 1995, through June, 1997. *[Director's Determination, Exhibit 1, Item 4]*

On December 23, 1998, NASC replied to the County's answer and stated that "NASC had never rejected a County lease offer." [*Director's Determination, Exhibit 1, Item 5*]

On January 20, 1999, the County submitted its rebuttal and stated that the "complainant is inconsistent and arbitrary in its arguments," and the complainant has never actually negotiated with the County for a fixed-base operation. [*Director's Determination, Exhibit 1, Item 6*]

On May 3, 1999, FAA issued its Director's Determination, which concluded that the County did not violate its Federal obligations. Accordingly, FAA dismissed the NASC formal complaint, 16-98-18, pursuant to 14 C.F.R. 16.247(b)(2). [*Final Decision and Order, Exhibit 1 Item 4*]

On May 17, 1999, the NASC appealed the Director's Determination. NASC based its appeal on errors with fact and analysis. [*Final Decision and Order, Exhibit 1 Item 1*]

May 23, 1997, letter requested "clarification of the many details that the County did not cover in its 21 May 97 letter." [*Director's Determination, Exhibit 1, Item 4, Ex. F*]

On June 9, 1999, the County replied to the appeal stating that the Director's Determination was sound and that NASC was incorrect in alleging that the Director's Determination contained errors of fact and analysis. [*Final Decision and Order, Exhibit 1, Item 3*]

## **BACKGROUND**

On November 21, 1995, The Rocky Mountain School of Skydiving requested approval by the County Board of Commissioners to operate a skydiving school at the County Airport. [*Director's Determination, Exhibit 1, Item 4, Ex. O*]

On October 5, 1996, Mark Wilbanks, Director of NASC Flight Operations, in a letter to the County, stated that, in order to expand operations, NASC would need to purchase parcels 18 and 21 of the Industrial Center Complex. [*Director's Determination, Exhibit 1, Item 4, Ex. P*]

On October 18, 1996, in a letter to the County Planning Commission, NASC asked the commissioners to reconsider their decision to deny NASC the requested parcels. [*Director's Determination, Exhibit 1, Item 4, Ex. R*]

On October 23, 1996, NASC sent a letter to the County that proposed to construct a building on lot 18 and to build a hangar within 2 years. NASC based its proposal on a verbal commitment from Commissioner Smith where Smith designated a hangar zoned federal airport property and lot 18 in the Industrial Center Complex as acceptable for a skydiving school. [*Director's Determination, Exhibit 1, Item 4S*]

On February 19, 1997, Kirk Samelson, Esq., representing NASC, in a letter to Ms. Brenda Jackson, Esq., County Attorney, NASC was interested in purchasing land east of the dirt runway with dimensions of approximately 500 feet by 700 feet. NASC would like to use that land for a training facility and a skydiving pit. NASC would continue to use the hangar, which it currently leases. The letter also states that NASC would be "willing to work with the County regarding payment to bring utilities to the property and to subdivide." *[Director's Determination, Exhibit 1, Item 4A]*

On February 26, 1997, Ms. Jackson responded to the letter from Mr. Samelson and stated that "at the present time, the County is not interested or willing to sell any property in the vicinity of the airport." *[Director's Determination, Exhibit 1, Item 4, B]*

On April 28, 1997, NASC provided a proposal to the County for a lease of approximately 8 acres of land east of the dirt runway, but NASC would be happy to purchase the land rather than leasing it. *[Director's Determination, Exhibit 1, Item 4C]*

On May 9, 1997, Ms. Jackson forwarded the NASC proposal to the Board of Commissioners for their review. *[Director's Determination, Exhibit 1, Item 5]*

On May 21, 1997, the County responded to NASC with a sample of the County Airport Land Lease. *[Director's Determination, Exhibit 1, Item 5E]*

On May 23, 1997, NASC again sought a lease agreement from the County. NASC reiterated its request for a 99-year term, a clause for commercial use a right of first refusal to purchase; a taxiway easement and a restriction on buildings within 500 feet of the property to 25 feet in height. *[Director's Determination, Exhibit 1, Item 4F]*

On June 11, 1997, the County responded to NASC by stating that because NASC rejected the County's lease proposal, the Commissioners will not be negotiating for, or entering into any further lease agreements for any portions of the Airport or surrounding property for at test 90 days. *[Director's Determination, Exhibit 1, Item 4G]*

On July 31, 1997, the District Court, Fremont County, Colorado, issued a Summons to Fremont County to respond to a NASC's allegations. When the County denied NASC the right to purchase or lease land at the Airport, NASC alleged that it had been deprived of equal protection and due process under the Constitution of the United States, in violation of 42 U.S.C. 1983. *[Director's Determination, Exhibit 1, Item 5, Ex. H]*

On January 30, 1998, the District Court dismissed NASC's complaint with prejudice. *[Director's Determination, Exhibit 1, Item 5I]*

On April 1, 1998, NASC states that it attempted to resolve the dispute with a proposal to resume lease negotiations through the Federal Aviation Administration, Denver Airports

District Office (DEN/ADO). In this letter, NASC stated for the first time in the record that it would like to establish a full service fixed base operation.  
*[Director's Determination, Exhibit 1, Item 5J]*

On April 8, 1998, the County responded to NASC stating that NASC must be willing to accept current lease terms and other arrangements that are currently available to new airport occupants. Such terms would require NASC to extend utilities to the site.  
*[Director's Determination, Exhibit 1, Item 5K]*

## **APPLICABLE LAW AND POLICY**

The Federal Aviation Act of 1958, as amended 49 U.S.C. Section 40101, *et seq.*, assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security and development of civil aeronautics. Various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities, augment the Federal role in encouraging and developing civil aviation. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds or other conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. The commitments that airport sponsors assume in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance as well as ensuring the public reasonable access to the airport. Pursuant to 49 USC § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

FAA Order 5190.6A, Airport Compliance Requirements, (hereinafter Order) provides the policies and procedures which the FAA follows in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances.

### **The Airport Sponsor Assurances**

As a condition precedent to providing airport development assistance under the AAIA, the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 USC § 47107(a), *et seq.*, sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. Section 511(b) of the AAIA, 49 U.S.C. 47107(g)(1) and (i) as amended by Pub. L. No. 103-305 (August 23, 1994) authorizes the Secretary to prescribe project sponsorship requirements to insure compliance with Section 511(a), 49 U.S.C. 47107(a)(1)(2)(3)(5)(6) as amended by Pub. L. No. 103-305 (August 23, 1994). These sponsorship requirements are included in every airport improvement grant agreement as set forth in FAA Order 5100.38A, Airport Improvement Program (AIP) Handbook, issued October 24, 1989, Ch. 15, Sec. 1, "Sponsor Assurances and Certification." Upon

acceptance of an AIP grant by an airport sponsor, the assurances become a binding contractual obligation between the airport sponsor and the Federal government.

### **Airport Owner Rights and Responsibilities**

Assurance 5, "Preserving Rights and Powers," of the prescribed sponsor assurances implements the provisions of the AAIA, 49 USC Section 47107(a), et seq. It requires, in pertinent part, that the sponsor of a federally obligated airport "will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor."

In addition to obligating the airport sponsor to preserve its rights and powers to carry out all grant agreement requirements, this assurance also places certain obligations on the sponsor regarding land upon which Federal funds have been spent.

FAA Order 5190.6A, Airport Compliance Requirements, (Order) describes the responsibilities under Assurance 5 assumed by the owners of public use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. See Order, Secs. 4-7 and 4-8.

### **Use on Reasonable and Not Unjustly Discriminatory Terms**

Assurance 22, "Economic Nondiscrimination," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport

"will make its airport available as an airport for public use on fair and reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical uses." Assurance 22(a)

"may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport." Assurance 22(h)

"may limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Assurance 22(i)

Subsection (h) qualifies subsection (a) and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions, which would be detrimental to the civil aviation needs of the public.

FAA Order 5190.6A describes the responsibilities under Assurance 22 assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. See Order, Secs. 4-14(a)(2) and 3-1.

The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. See Order, Sec. 3-8(a).

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. See Order, Sec. 4-13(a).

### **The Prohibition Against Exclusive Rights**

Section 308(a) of the FAA Act, 49 USC § 40103(e), provides, in relevant part, that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

Section 511(a)(2) of the AAIA, 49 USC § 47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

Assurance 23, "Exclusive Rights," of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a federally obligated airport "...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public...and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982."

In FAA Order 5190.1A, Exclusive Rights, the FAA published its exclusive rights policy and broadly identified aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. See FAA Order 5190.1A, Para. 11.c.

FAA Order 5190.6A provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. See Order, Ch. 3.

## **The FAA Airport Compliance Program**

The FAA discharges its responsibility for ensuring that airport sponsors comply with their Federal obligations through its Airport Compliance Program. Sponsor contractual obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving Federal grant funds or accepts the transfer of Federal property for airport purposes. The FAA incorporates these obligations in grant agreements and instruments of conveyance to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports which airport sponsors operate in a manner consistent with their Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that airport sponsors serve the public interest.

FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports and facilitates interpretation of the assurances by FAA personnel.

## **ANALYSIS AND DISCUSSION**

NASC in its appeal submits the Director's Determination contains errors on the following points:

- the beginning date of lease negotiations,
- the number of times the County offered a lease to NASC,
- the County's handling-time for NASC's lease request,
- the sale of land to United Parcel Service and economic discrimination,
- terms offered to NASC and historical precedent and
- conflict of interest against NASC by a Commission member.

**Lease Negotiations Start Date.** In its appeal, the NASC asserts the starting date for lease negotiations was November 1995, rather than October 1996 as indicated in the Director's Determination. The reason for the confusion, according to NASC is that The

Rocky Mountain School of Skydiving (TRMSS) was renamed the National Airlift Support Corporation in late 1995. In its reply, the County states that more than one entity was controlled by Mr. Wilbanks, president of NASC, and the County asserted it had already addressed the starting date of negotiations in their answer to the formal complaint.

FAA finds that the outcome of the Director's Determination was not affected by the November 1995 letter, because the negotiations referred to in the letter were concluded when TRMSS accepted the County's offer to locate in hanger 21. In its letter of November 1995, TRMSS requested approval to operate a skydiving school in the Industrial Center Complex. The County turned the request down because the County considered it aviation use, which did not comply with Industrial Center Complex zoning. The County did offer TRMSS a location on the airport in hanger 21, which TRMSS accepted. The FAA finds that TRMSS's acceptance of the offer concluded the November 1995 negotiation. Accordingly, the negotiations that commenced in October 1996 were new negotiations, not a continuation of the negotiations of November 1995. In addition, the record shows the County was consistent in not allowing skydiving operations in the Industrial Center Complex. The Airport has housed a number of skydiving operations but none have been located in the Industrial Center Complex. In subsequent negotiations, the County continued to deny NASC space in the Industrial Center Complex. For these subsequent negotiations, the Director's Determination found the County was justified in denying NASC space based on NASC's refusal to accept reasonable terms and refusal to accept terms, which it offered to similarly situated skydiving operations.

The FAA concludes the record remains vague on the question of whether the Rocky Mountain School of Skydiving and NASC are in fact the same entity. However, TRMSS concluded its negotiations that commenced in November 1995, when it accepted a lease in hanger 21. Consequently, NASC's negotiations, which commenced in October 1996, were not a continuation of the November 1995 negotiations.

**Lease Offers.** In its appeal, the NASC asserts that the County had not offered it a lease on May 21, 1997, or on April 8, 1998, as stated in the Director's Determination. According to NASC, the letters from the County were vague offers to negotiate, and that the County demanded NASC submit further information. In its reply, the County asserted it made two such offers to NASC and that NASC's Answer to the Complaint supported this assertion.

The FAA concludes that the question of formal negotiations did not affect the outcome of the Director's Determination. Formal negotiations did not affect the Director's Determination because NASC requested terms, which were more favorable than the County had offered two other similarly situated leaseholders. The record does support that on two occasions the County provided NASC with a copy of their standard lease agreement in effect at the time that NASC made the request. The record also supports that NASC rejected the standard lease agreements because the lease duration was less than 99 years, and because the County did not allow NASC space in the Industrial Center Complex. The NASC asserts that it is entitled to the 99-year duration because other



airport tenants as late as 1995 had secured 99-year leases. The Director's Determination considered this argument and found that the County was not in violation of its Federal obligations when it ended negotiations with NASC. It was not in violation because the County was not offering terms of 99 years at the time NASC made its request. The Director's Determination states that the standard lease agreement sent to NASC in response to its April 28, 1997, proposal is the same lease agreement that was executed to Peak Soaring and Rocky Mountain High Sky Adventures. These agreements have identical terms and vary only in the size of the leasehold and cost per square foot. Accordingly, the County could not have awarded a more favorable lease to NASC without discriminating against the two other similarly situated leaseholds. Further, NASC in its appeal has failed to establish that it requested a 99-year lease in the period when the County offered 99-year leases. Nor did the NASC establish it would be entitled to such a lease based on similarities with other lease holders, such similarities would include, level of investment, job creation, business type or other relevant factors. With regard to locating in the Industrial Center Complex, the Director's Determination found that on October 1989, the FAA released the land to Fremont County. The effect of the release was to remove the County's obligation to provide access to the Industrial Center Complex and to remove the prohibition on exclusive rights. The NASC, in its appeal, did not address the reasoning in this portion of the Director's Determination.

FAA concludes that the record is vague on whether the County offered NASC a lease or was simply sending NASC a standard lease form on which it could eventually negotiate a lease. However, for the reasons stated above, the distinction is not relevant because, the NASC would not accept terms offered to similarly situated leaseholders.

**Unreasonable Delays.** In its appeal, NASC asserts the County imposed unreasonable administrative delays in the processing of its lease request. It asserts that its request was pending for a period of two years, until February 26, 1997, and the delay is attributable to the County's lack of written guidance for processing such requests. NASC also asserts that the United Parcel Service received different terms than a standard lease when it purchased lots 15 and 16. NASC states that the Director's Determination should not have relied upon airport leases for a standard but should have instead used airport land sales. In its reply, the County responds that it offered standard lease agreements, so the County was not responsible for unreasonably delaying the request. The County did not address whether it has written guidance for processing requests.

The Director's Determination indicates the period of time between NASC's initial request in November 1995 until the County's rejection letter dated February 26, 1997 was 15 months. During this period, the Director's Determination indicates NASC wrote the County five letters regarding its request to purchase or lease property for its proposed operations. The nature of the request was NASC wanted to have the zoning changed in the Industrial Center Complex to allow for a skydiving school. It wanted to purchase parcels 18 and 21 in the Industrial Center Complex and locate the school on those parcels. It planned to construct a 24 by 70-foot modular building with a snack bar and a 10-meter radius pea-gravel landing-pit.

The FAA finds the time frame of 15 months is not unreasonable considering the nature of the request. Also, the FAA finds the Industrial Center Complex was not subject to FAA grant obligations. When the FAA released the land, the County was free to develop the land in accordance with its plan for the Industrial Center Complex. The County was not under obligation to sell land to NASC or to afford NASC the same treatment it received as a tenant of the Airport. The County originally purchased the land for the development of the Airport with the help of FAA grant funds. The grant funds obligated the County to use the land in accordance with the terms, conditions, reservations, and restrictions of the FAA grant agreements. When the County found the land no longer served its intended purpose, it petitioned the FAA for release. On November 11, 1989, the FAA executed the Instrument of Release. The Instrument of Release freed the County from the terms, conditions, reservations and restrictions of the grant agreements. The release document placed just five reservations on future uses of the land. These restrictions are the air space above the land must remain open to air traffic, structures on the land may not exceed 24 feet, use of the land may not interfere with Airport radio activity, the sponsor must control access to the airport, and the land must have a perimeter fence. Consequently, the County was not in violation of its obligations to FAA when it zoned the land for particular uses and refused to sell or lease to NASC.

The FAA concludes on the basis of the record that the NASC appeal did not provide any additional information that would establish that the County unreasonably delayed its response to NASC's request to establish a skydiving school in the Industrial Center Complex. Nor did the NASC appeal did not provide any additional information, which would establish that the County unreasonably denied NASC the opportunity to lease or purchase Industrial Center Complex land. Nor did the NASC appeal provide any additional information which would justify the extension of the FAA grant assurances to the released property.

**Sale of Land to United Parcel Service.** In its appeal, NASC asserts the FAA failed to consider the sale of land to the United Parcel Service as being relevant to its request for a lease of land on airport property. The NASC contends that the sale is an example of the County's economic discrimination against NASC. In its reply, the County responds the land was not on airport property, and the sale was not relevant to the proceeding.

The Director's Determination previously considered the question of unjust economic discrimination against NASC. The Director's Determination concluded that the County did not unreasonably discriminate against NASC when it denied NASC's request. The Director's Determination reasoned that the County is under no obligation to sell airport land, and the County may not sell airport land without FAA approval.

When the County sold two acres of land to the United Parcel Service, it violated its FAA grant obligations. The County, which purchased the land in part with AIP funds, was obligated to use the land for Airport development. After the sale, the County formally petitioned the FAA for release of the land. In its request, the airport stated the land was surplus to its needs. On May 5, 1997, the FAA issued an Instrument of Release which freed the County from the FAA grant obligations. However, the release agreement

obligated the County to repay the land's fair market value, which the County agreed to do by reducing the County's next AIP grant by \$6,000 which was the selling price to the United Parcel Service. The Director's Determination concluded the sale did not constitute a precedent with regard to the NASC lease request, because the sale was unauthorized and unrelated to leaseholds on the airport.

The FAA finds that the County's unlawful sale of land to United Parcel Service, is not sufficient precedent for establishing a finding of economic discrimination. A finding of economic discrimination must be based on rates, fees, rents or other charges being dissimilarly charged to other similarly situated airport operators. In this case, the FAA does not consider the unlawful sale of land to be a rate, fee, rent or other charge. Nor does the FAA consider NASC and United Parcel Service to be similarly situated operators. Further, the FAA cannot classify the United Parcel Service as an airport operator because the United Parcel Service is located outside of the airport's boundaries. On the other hand, NASC is part of the group of operators, which conducts skydiving activities. If FAA allowed NASC better rates, fees, rents, or other charges than it charges to the other skydiving operators, the effect would be economic discrimination against those other operators.

The FAA concludes on the basis of the record that the NASC appeal did not provide additional information which would establish that the inappropriate sale of land to the United Parcel Service constituted unjust economic discrimination against NASC.

**Terms Offered to NASC and Historical Precedent.** In its appeal, NASC asserts that the County should award it a 99-year lease. The NASC stated that prior to 1995, the County allowed lease terms of 99-years, but after 1995, the County no longer offered such long-term leases. NASC reasons that it should be awarded the 99-year lease because it began a formal process in November of 1995 to secure such a lease. According to NASC, it would be discriminatory to award it a lease of less than 99-years and that the County does not have standard lease terms at the airport. In its reply, the County's did not indicate whether the airport has established standard lease terms. The reply stated that NASC was not attempting to obtain standard lease terms.

The FAA finds that whether or not the County had established a schedule of standard lease terms did not impact the Director's Determination. Because, it is clear from the record that NASC was not attempting to enter into a standard lease agreement. The factors which made the NASC request unique is its request to lease or purchase unobligated land, change zoning requirements and obtain nonstandard lease terms. With regard to historical precedent, the Director's Determination concluded that the County's offer to NASC was consistent with terms offered to comparable tenants and that to offer more favorable terms to NASC would have been discriminatory to the airport's other similarly situated tenants.

The FAA concludes that the NASC appeal did not provide additional information which would establish that the County violated the requirement to treat each similarly situated tenant to the same rates, fees, rentals, and other charges. Nor did the NASC appeal

provide additional information to indicate that the County had wrongfully ignored historical precedents while negotiating with NASC. As noted above, the FAA considers the lease negotiations of October 1996 to be a new negotiation rather than a continuation of negotiations which concluded in November 1995, and the FAA concluded the Industrial Center Complex was not under FAA grant obligation. As already stated, airport sponsors may amend their policies over time just so that the new policies are applied fairly to all similarly situated users.

**Commissioner's Conflict of Interest.** In its appeal, the NASC asserts that Mr. Baird, Director of the Airport Board, stymied its request for space on the airport. According to NASC, Mr. Baird occupied an office on the airport rent-free until NASC made the arrangement public. After that time the County charged Mr. Baird rent which he paid by pumping aviation fuel for the County. When NASC requested Mr. Baird's space to house a classroom, the Board turned NASC's request down. The denial, according to NASC, constituted a conflict of interest against NASC. NASC also alleges that Mr. Baird is an FAA employee. In its reply, the County's responds that Mr. Baird does occupy space at the airport and that Mr. Baird pays rent for the space. The reply does not state when Mr. Baird began paying rent for the space or whether he owes back rent for past periods. Nor does the County reply state whether Mr. Baird disqualified himself from voting on NASC's request for the space.

The FAA finds that the record does not support the NASC allegation that the Director exercised undo influence with regard to NASC's lease request. According to the Director's Determination, the County did engage in good faith negotiations with NASC. The Director's Determination concluded that it was only NASC's insistence on terms, which were more favorable than the terms offered to other similar operators that caused the Board to turn down NASC's request. Also the fact that Mr. Baird may be a Designated Flight Examiner does not mean that he is an FAA employee. Most Designated Flight Examiners are not employed by the FAA. Mr. Baird evidently at one time was employed by the FAA, however, he retired from the FAA prior to November 1995 when negotiations began. Finally, contrary to what NASC alleges, the existence of a conflict of interest (which has not been established here) does not necessarily constitute economic discrimination.

The FAA concludes that the NASC appeal did not provide persuasive evidence which would cause FAA to conclude that the Director of the Airport Board exercised undo influence with regard to NASC's request for space on the airport.

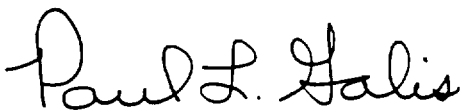
### **FINDING.**

The appeal does not provide sufficient basis for reversing the Director's Determination with regard to the County obligations under 49 U.S.C. 40103(e) or 49 U.S.C. 47107(a)(4) and the applicable grant assurances. The Director's Determination in this matter is supported by substantial evidence and is consistent with applicable statutory requirements and FAA policy as described above.

Therefore, the FAA dismisses this Appeal pursuant to 14 CFR 16.33. This Decision constitutes the final decision of the Associate Administrator for Airports, pursuant to 14 CFR 16.33(a), under the authority of 49 U.S.C. Section 47122.

### **APPEAL RIGHTS**

A person disclosing a substantial interest in this final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. Section 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued.



for: Louise E. Maillett  
Acting Associate Administrator for  
Airports